United States Circuit Court of Appeals

For the Ninth District

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,
Plaintiffs in Error,
vs.
ETTA EICHELBARGER and STANLEY EICHELBARGER, her husband,
Defendants in Error.

No. 3521

BRIEF OF DEFENDANTS IN ERROR

CHAS. H. HARTGE, and
PRESTON, THORGRIMSON & TURNER,
Attorneys for Defendants in Error.

911 Lowman Bldg., Seattle, Washington.

Dearborn Printing Co., 212 Marion Street, Seattle

United States Circuit Court of Appeals

For the Ninth District

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,
Plaintiffs in Error,
vs.
ETTA EICHELBARGER and STANLEY EICHELBARGER, her husband,
Defendants in Error.

No. 3521

BRIEF OF DEFENDANTS IN ERROR

CHAS. H. HARTGE, and
PRESTON, THORGRIMSON & TURNER,
Attorneys for Defendants in Error.

911 Lowman Bldg., Seattle, Washington.

ARGUMENT.

I.

The first error assigned by Plaintiff in Error is the giving of an instruction by the court to the jury.

There are three conclusive reasons why this assignment of error cannot be sustained.

In the first place the giving of the instruction which is assigned as error in the brief was not excepted to upon trial. At the time of giving the instructions to the jury, counsel for Plaintiff in Error excepted to the refusal of the court to give certain instructions, and also to the giving of instructions numbers 1, 3 and 4 as requested by Defendant in Error, the exceptions being taken simply by reference to the numbers of the requests. The instructions contained in those numbers are set forth in the Bill of Exceptions, and it clearly appears that the instruction complained of in the brief is neither instruction 1, 3 or 4. (Transcript of Record, pp. 58, 59.)

In the second place the only exceptions taken to the giving of instructions at all was by number, and the court disallowed the exceptions as being too

general. (Transcript of Record, p. 58.) This disallowance was proper as such exceptions are insufficient.

> *U. S. Coal Co. vs. Pinkerton,* 169 Fed. 536;
> *Pa. Co. vs. Sheeley,* 221 Fed. 901;
> 38 Cyc. 1802.

In the third place, the instruction was at least as favorable to Plaintiff in Error as plaintiff was entitled to and the only objections that could have been made to it must have been made by the Defendant in Error. The instruction quoted in the brief was not in fact requested by the Defendant in Error.

In discussing this assignment of error, counsel at page 11 of the brief complains that there were no facts or circumstances under which the board broke which could be taken into consideration by the jury, and that the only fact for the jury's consideration was the breaking of the seat, which the court told the jury was not sufficient to create liability, and counsel therefore contends that the instruction is contradictory in itself.

We are unable to agree with counsel. It appears by the testimony quoted in the brief of Plaintiffs in Error and set forth in the Bill of Exceptions,

that at the time the seat broke, although it was some twelve feet in length between supports and therefore calculated to seat a number of people, that there was no weight upon it except of the Defendant in error. That a seat should break under an unusual load, or one which it is not calculated to support, would not be evidence of negligence, but when one paying admission to attend a public performance is directed by the party giving the performance to walk across a row of seats and one of those seats breaks under the weight of one person stepping in the usual manner upon such seat, the breaking of the seat, taken in connection with the weight placed upon it, the fact that it was used in the usual manner and that it was obviously calculated and intended to carry a much heavier load, is certainly sufficient prima facie to prove negligence. This will, however, be more fully discussed in the second point of the brief. As the instruction was not in fact excepted to at the trial, Plaintiff in Error cannot complain of it here.

II.

The second point relied upon for reversal is insufficiency of the evidence to justify a verdict. The

argument in support of the contention is based upon the claim that there was no sufficient proof of negligence of the Plaintiffs in Error.

It is contended that the doctrine of *res ipsa loquitur* does not apply to the case, first, because it is not applicabble to the facts involved and second, because it is contended that the specific acts of negligence relied upon by Defendants in Error in their complaint, were set forth and that the doctrine of *res ipsa loquitur* does not apply to a case in which specific negligence is alleged. We will discuss these points in their order first, however, discussing somewhat in detail the authorities cited by Plaintiffs in Error.

In the first place we desire to call to the court's attention the fact that not a single case has been cited by Plaintiffs in Error involving the responsibility of the proprietor of a place of public amusement to furnish a safe place to those paying admission and attending the performance by invitation of the proprietor. The cases cited involve entirely different situations. We will review each of the cases cited by Plaintiffs in Error.

KIGHT vs. METROPOLITAN RY. CO., 21 App. D. C. 494—

While in discussing *res ipsa loquitur* the Court uses the language quoted, it does not pass upon the applicability of the doctrine to the facts of that case, holding that irrespective of that question there was sufficient positive evidence of negligence to go to the jury. The case was one of an injury to a street car passenger from a stampede caused by a fuse blow-out.

McGRATH vs. ST. LOUIS TRANSIT CO. (Mo.), 94 S. W. 872—

The plaintiff, a track workman, was injured by a car. The complaint specifically alleged failure to give warning and negligent running into plaintiff. The court held, as stated in the brief, to the effect that where from the facts as shown an inference of negligence other than that of the defendant was just as reasonable as an inference of defendant's negligence, *res ipsa loquitur* would not apply, which holding was of course correct. As a matter of fact the court further held that in that case the plaintiff was guilty of contributory negligence as a matter of law.

PARSONS vs. HECLA IRON WORKS (Mass.), 71 N. E. 572.

The quotation from this case does not, in our opinion, correctly state the conclusion of the court. What the court held was that where

it had been stipulated in the case that the staging was entirely firm when first put up and where the evidence itself clearly showed the cause of the fall, which was the removal of braces, the doctrine of *res ipsa loquitur* could not be involved.

MAY vs. BERLIN IRON BRIDGE CO., 60 N. Y. S. 550—

This was an action brought by a workman injured by the fall of trusses which were being put in place in the construction of a building. The doctrine of the case has no application to an injury resulting from a completed structure put to its ordinary use at the invitation of the owner to one who pays admission.

CLARK vs. GRANBY MINING & SMELTING CO. (Mo.), 183 S. W. 1099—

This was a case of a gratuitous lender of a boiler, who voluntarily repaired it. The plaintiff alleged specific negligence in placing a riveted stay bolt in the boiler, which allegation was not supported by the proof. The court held that *res ipsa loquitur* did not apply for two reasons, first, because the specific act of negligence relied upon was alleged and not proved and second because the defendant was not in control and management of the boiler in such a manner as to make the doctrine applicable.

THE GREAT NORTHERN, 251 Federal 826—

This is a case decided by this court. The case was one involving the fall of a passenger

on board ship on the bathroom floor. There was no showing of faulty construction. The court held there was no evidence of negligence and that the plaintiff had assumed the risk. Among othe grounds of the court's decision the court made the statement set forth in plaintiff's brief, that—"where plaintiff in an action for negligence *specifically sets out in full* in what the defendant's negligence consisted, the doctrine of *res ipsa loquitur* has no application." (Italics are ours.) It appears by an examination of the case that plaintiff in the case alleged negligent construction of the bathroom, giving at some length the details of construction, followed by the conclusion that the bowl was slippery and difficult to stand upon and that there was no provision for any hand hold, nor was there a rubber mat. The trial court found that the plaintiff did not slip at all on the bottom of the basin. but because of the lurching of the vessel when he was about to step into the bathroom and that it was caused without any negligence of the vessel.

It is quite obvious from the facts of the case that without regard to the allegations contained in the complaint there was no opportunity for the application of the doctrine of *res ipsa loquitur*. Conceding for the moment, for the purpose of the argument, however, that it is the rule that where one alleges specific negligence, the doctrine of *res ipsa loquitur* cannot be relied upon by plaintiff, we submit the rule has no application to the case at bar. The allegations made by Defendants in Error in this case as to negligence follow a statement of the fact that the Plaintiffs in Error were conducting a

show, that the Defendant in Error paid admission and was directed by Plaintiffs in Error to walk across a row of seats, that she stepped upon one of those seats which broke and precipitated her to the ground below and that the seat was weak and defective. The allegation of negligence is that—"said accident was caused solely by the negligence of the defendants in placing in the said row or bank of seats the said defective and weak seat, and in directing the said plaintiff, Etta Eichelbarger, as aforesaid, to seek a seat in the said row or bank, and for that purpose to step upon the said seats."

We submit that there is here no allegation of specific negligence. It amounts to no more than a statement that the Defendant in Error was directed by Plaintiffs in Error to step upon the seat and that it broke, that it was weak or defective follows from its breaking. It was necessary to allege that she was directed to step upon it in order to connect the Plaintiffs in Error with the negligence causing her injury. Why it broke, what the defect or weakness was, how it was caused, why it was not discovered and removed, are all left at large, the complaint alleging only the ultimate facts upon which her recovery depends, to-wit: that the Plaintiffs in Error having received her admission fee negligently placed her upon a weak or defective seat which broke under her weight. Assuming the rule to be as stated in the decision above cited, it is not applicable to the pleading and facts of this case.

WHITE vs. CHICAGO G. W. R. CO., 246 Federal 427, 158 C. C. A. 491—

The rule above stated that where the complaint specifically sets out the acts of negligence, the doctrine of *res ipsa loquitur* does not apply, is laid down in this case. We call attention, however, to the extremely full and specific allegations of the complaint set forth at page 430 of the report.

FRANCEY vs. RUTHLAND RY. CO. (N. Y.), 119 N. E. 86—

The proof in this case showed that the accident might be due either to the defendant's negligence or that of the plaintiff.

The statement made in counsel's brief is from the syllabus of the case and is not contrary to any contention which we make. The court adopted as the rule the following language quoted from another New York case:

> "When the thing causing the injury is shown to be under the control of a defendant, and the accident is such as, in the ordinary course of business, does not happen if reasonable care is used, it does, in the absence of explanation by the defendant afford sufficient evidence that the accident arose from want of care on its part." (See page 87.)

That is the rule which we contend for in this case.

McGOWAN vs. NELSON, 92 P. 40—

The rule stated from this case is correct and sustains the position of Defendant in Error.

FITZGERALD vs. GOLDSTEIN, 107 N. Y. S. 614—

There is nothing in this case conflicting with the position of Defendant in Error.

LONE STAR BREWING CO. vs. WILLIE, 114 S. W. 186—

The language quoted from this case in brief of Plaintiffs in Error is a comment in a case where the evidence showed no negligence of the defendant and none which could reasonably be presumed from the facts as shown by the evidence. It was a case in which the instrumentality was in control of the plaintiff in the case.

ROBINSON vs. CONSOLIDATED GAS CO. of NEW YORK, 86 N. E. 805—

The rule as stated from this case is sound and relied upon by Defendant in Error. The case was one of the fall of a scaffold, subjected to an excessive strain with lateral pressure to which it was not adapted. The court recognizing it to be the rule that if the scafforld fell while being subjected to ordinary use and with-

out any explanation, *res ipsa loquitur* would apply, held it inapplicable in the face of the extraordinary and unusual use.

FEINGOLD vs. OCEAN S. S. CO. OF SAVANNAH, GA., 113 N. Y. S. 1018—

This was a case of an employe injured by the breaking of a rope, used in hoisting lumber. *res ipsa loquitur* was not applied because it was not shown:

(1) That the weight was ordinary or proper, or indeed what weight was placed upon the rope.

(2) The size of the rope.

(3) That the rope was being used in the ordinary way.

KENNEDY vs. HAWKINS, 102 P. 733—

This was a suit by a tenant of a building for the falling of a wall of the building, the suit being against the contractors who were removing the underpinning under a contract with the owner. The complaint alleged negligence in failing to properly brace. No evidence was introduced to support the allegation. The evidence indicated that the accident happened by reason of the act of the owner in removal of too much supporting earth for which the defendants were not responsible.

TEXAS & P. COAL CO. vs. KOWSIKOWSIKI, 125 S. W. 3—

The rule stated as the doctrine of this case is sound and supports the position of the Defendant in Error.

LUCID vs. E. I. DuPONT De NEMOURS POWDER CO., 199 F. 377, 188 C. C. A. 61—

This is another case decided by this court. The case was decided on demurrer, the lower court sustaining the demurrer and the case being reversed by this court on the ground that the allegation which charged the defendants with negligently storing powder was sufficient and that the doctrine of *res ipsa loquitur* applied to the case.

DAVIS vs. CRISHAM, 99 N. E. 959—

This was the case of an injury to a mail carrier on the breaking of the fastenings of a wagon seat. The negligence alleged was unsafe fastenings, no claim being made of negligent driving. The evidence showed it to be probable that the horse suddenly started, throwing plaintiff backward and putting an unusual strain on the fastenings. We fail to see the application of this case to the situation in the case at bar.

HARDIE vs. CHARLES P. BOLAND CO., 98 N. E. 661—

The statement quoted from this case is not contrary to any position taken by Defendant in Error in this case. It was a case where a chimney collapsed, injuring a workman who was engaged as a mason in its construction. The evidence showed that the collapse was caused by the faulty plan of the architect and not by the negligence of the defendant contractor.

CANODE vs. SEWELL, 182 S. W. 421—

The statement from this case is not objectionable to our position.

HUFF vs. AUSTIN (OHIO), 21 N. E. 864—

In this case the court holds that boiler explosions are not infreqquent, even where there is no want of care.

GARRETT vs. SOUTHERN RY. CO., 101 Federal 102—

In this case Judge Taft holds that it is not judicially known by the court that preventative of spark emission by locomotives has reached that state of perfection, that it is improbable that sparks would be emitted if due care was used in construction of the boiler.

III.

PLAINTIFF IN ERROR BOUND TO FURNISH SAFE SEAT.

Having reviewed the authorities cited in the brief for Plaintiffs in Error, we will now proceed to a discussion of the case upon the law and facts as we understand them. It is to be noted in the cases cited in the brief of Plaintiffs in Error that they are largely cases where there was no relation of contract between the parties. Defendant in Error in this case paid admission to the show given by Plaintiffs in Error and had a right to rely upon the safety of the seats upon which she was directed to sit, or upon which she was directed to walk. The cases have not all stated the rule of liability of such a show proprietor in the same way. Many authorities state the rule to be that under such circumstances there is an implied warranty of the safety of the appliance. In other cases it is stated that the implied warranty is that due care has been used by the proprietor in providing safe appliances. Other cases state the rule to be that there is an implied warranty as to safety except as against de-

fects which are latent and undiscoverable by the exercise of due care.

> "The owner of a place of entertainment is charged with an affirmative positive obligation to know that the premises are safe for the public use, and to furnish adequate appliances for the prevention of injuries which might be anticipated from the nature of the performance and he impliedly warrants the premises to be reasonably safe for the purpose for which they are designed."

38 Cyc. p. 268.

> "The owner of a place of entertainment is charged with an affirmative positive obligation to know that the premises are safe for the public use. He may not be exonerated merely because he had no precise knowledge of the defective condition of the place to which he has invited the public. When they accept his invitation and pay the prescribed admission fee, they have a right to assume he has furnished a safe place for them to witness the performance. If he leases the premises knowing the public use is to continue, he must at least be reasonably assured that they have not deteriorated, that they are still safe for occupancy by the public. This obligation requires affirmative action on his part; and, in order that he may be exculpated to one injured by reason of the decay of the place he vouched for, it must appear that he inspected the property or in some other adequate manner fulfilled his obligation to the public before leasing the same."

Lusk vs. Peck, 116 N. Y. Sup. 1051-4.

"When Brittain paid his admission fee and entered upon the seats in question, it was a matter of no importance to him who had erected the seats. Whether the representatives or managers of the fair, or Smith & Lucas, furnished the seats, he had a right to expect that he would be provided with reasonably safe seats."

Texas State Fair vs. Brittain, 118 Fed. Rep. 713-715.

"The fact that the amusement was furnished by a third party under an independent contract with the appellants in no manner relieved them from the duty to see that the appliances were reasonably safe for the use intended."

Wodnik vs. Luna Park Amusement Co., 42 L. R. A. (N. S.) 1070-1073 (Wash.).

"The managers of the grounds and stands occupied upon the occasion in question the position of proprietors of a public resort. Plaintiff was not a mere licensee, and did not occupy the stand by mere invitation. Whether responsibility to the plaintiff is grounded, in the form of action instituted, upon a contract, or upon a duty, it exists, if at all, because of an implied contract. The implied contract was that the stand was reasonably fit and proper for the use to which it was put. The duty was to see to it that it was in a fit and proper condition for such use. Neither plaintiff nor the public generally would be expected to examine the stand

and judge of its safety. This consideration, and the probable consequences of failure of the structure, imposed upon the responsible and profiting persons the duty of exercising a high degree of care to prevent disaster. They were not insurers of safety. They did not contract that there were no unknown defects not discoverable by the use of reasonable means, but, having constructed the stand, they did contract that, except for such defects, it was safe."

Scott vs. University of Michigan Athletic Ass'n, 17 L. R. A. (N. S.) 234-236 (Mich.).

"In my opinion, the defendant, having built the structure for the amusement or entertainment of the public, impliedly warranted that it might be used with such safety to the person as could reasonably be demanded."

Barrett vs. Lake Ontario Beach Improvement Co., 61 L. R. A. 829, 831 (N. Y.).

"A man who causes a building to be erected for viewing a public exhibition, and admits persons on payment of money to a seat in the building, impliedly undertakes that due care has been exercised in the erection, and that the building is reasonably fit for the purpose; and it is immaterial whether the money is to be appropriated to his own use or not." * * *

"There is a principle which I hold to be well established by all the authorities that one who lets for hire or engages for the supply of any article or thing, whether it be a carriage to be ridden in, or a bridge to be passed over, or a

stand from which to view a steeple chase, or a place to be sat in by anybody who is to witness a spectacle, for a pecuniary consideration, does warrant and does impliedly contract that the article or thing is reasonably fit for the purpose to which it is to be applied." * * *

"I do not at all pretend to say whether the relation of the parties raised a contract or a duty. It seems to me exactly the same thing; but I am of opinion that when a man has erected a stand of this kind for profit, that he contracts impliedly with each individual who enters there, and pays money to him for the entrance to it, that it is reasonably fit and proper for the purpose; or, if you choose to put it in another form, that it is the duty of the person who so holds out the building of this sort to have it in a fit and proper state for the safe reception of the persons who are admitted."

Francis vs. Cockrell, L. R. 5, Q. B. 184.
See also:

Thompson vs. Lowell, 40 L. R. A. 345 (Mass.).

Fox vs. Buffalo Park, 47 N. Y. Sup. 788.

IV.

DOCTRINE OF RES IPSA LOQUITUR APPLIES

"The doctrine *res ipsa loquitur* asserts that whenever a thing which produced an injury is shown to have been under the control and

management of the defendant, and the occurrence is such as in the ordinary course of events does not happen if due care has been exercised, the fact of injury itself will be deemed to afford sufficient evidence to support a recovery in the absence of any explanation by the defendant tending to show that the injury was not due to his want of care."

20 R. C. L. Par. 156, p. 187.

"It is generally held that the mere fact that an injury has occurred on the premises of defendant creates no presumption of negligence on his part, in the absence of evidence of some defect. Where, however, defendant owed to the injured person the duty of making the premises safe, the doctrine *res ipsa loquitur* applies."

29 Cyc. p. 594.

The rule has been applied and the accident and circumstances under which it occurred held sufficient to go to the jury as sufficient to sustain a verdict of negligence in a great variety of cases, including accidents happening through failures in appliances in places of public resort or amusement.

In the case in the State of Washington, from which we have quoted above, the plaintiff paid admission to Luna Park, a place of public amusement in which there was maintained a mechanical device

called a striking machine, so arranged that the patrons could with a heavy mallet strike and cause the force of the blow to be registered. The plaintiff used a mallet, the head of which flew off as the blow was being struck, injuring the plaintiff. The defendant, owner of Luna Park, defended on the ground that the striking machine was operated by an independent contractor, but the court held as above quoted that this was no defense, as the Luna Park proprietors having received a part of the proceeds of the admission fee, were liable upon an implied warranty of the safety of the appliances offered the public therein. It was further contended by the defendant that there was not sufficient evidence of negligence, to which contention the court said:

> "We think that the fact that the head of the mallet flew off while the mallet was being used by the respondent for the very purpose for which it was furnished to him, was sufficient to cast the burden of explanation upon the appellants. No explanation being offered, the jury was warranted in inferring that the head of the mallet came off because it was negligently and insecurely fastened to the handle.
>
> "'When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as, in the

ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care.' 1 Shearm. & Ref. Neg. 5th ed. par. 59.

"The doctrine of *res ipsa loquitur* means that the jury, from their experience and observation as men, are warranted in finding that an accident of this kind does not ordinarily happen, except in consequence of negligence. As was said in *Griffin vs. Boston & A. R. Co.*, 148 Mass. 143, 1 L. R. A. 698, 12 Am. St. Rep. 526, 19 N. E. 166; 'All that the plaintiff upon this branch of his case was required to do was to make it appear to be more probable that the injury came, in whole or in part, from the defendant's negligence than from any other cause.' *Graaf vs. Vulcan Iron Works*, 59 Wash. 325, 328, 109 Pac. 1016, 1017.

"There was no duty of inspection resting upon the respondent. There was no evidence of any defect so patent that he ought to have observed it without inspection. He had the right to assume that the mallet was fit for the purpose for which it was furnished him. He cannot be held to have assumed the risk of injury from any defects not so patent as to have been apparent to the casual observer. This court is committed to the rule that the doctrine *res ipsa loquitur*, under conditions where there is no duty of inspection upon the servant, is applicable even as between master and servant. *La Bee vs. Sultan Logging Co.*, 47 Wash. 57, 20 L. R. A. (N. S.) 405, 91 Pac. 560; *La Bee vs. Sultan Logging Co.*, 51 Wash. 81, 20 L. R. A. (N. S.) 408, 97 Pac. 1104; *Graaf vs. Vulcan*

Iron Works, 59 Wash. 325, 109 Pac. 1016; *Cleary vs. General Contracting Co.,* 53 Wash. 254, 101 Pac. 888.

"'*A fortiori* is the doctrine applicable in a case of this kind where a customer or patron is present by invitation, and is injured by an instrumentality under the exclusive control of the defendant or his agents. *Anderson vs. McCarthy Dry Goods Co.,* 49 Wash. 398, 16 L. R. A. (N. S.) 931, 126 Am. St. Rep. 870, 95 Pac. 325. And for a still stronger reason should the doctrine be invoked where, as here, the instrumentality which caused the injury was handed to the patron for use in the very purpose for which he was invited. In the very nature of the case, the respondent could not be expected to prove the specific defect in the mallet which caused the head to separate from the handle. That could only have been determined by inspection. The duty of inspection was upon the appellants. They offered no evidence of such inspection. The jury was warranted in finding them negligent."

Wodnik vs. Luna Park Amusement Co., 42 L. R. A. (N. S.) 1070, 1074, 1076 (Wash.).

"The law is well settled in this state that, where a party in possession of premises throws the same open to the public for the purpose of gain, he impliedly warrants the premises to be reasonably safe for the purposes for which they were designed; and where, as in the case at bar, the plaintiff is injured by the fall of a structure which she is using at the invitation of the person in charge, and in the manner which such person had a right to expect the same

> would be used, the burden of explaining the cause of the accident and of showing freedom from negligence is upon the defendant. The plaintiff was upon this platform for the purpose of eating a meal. She was there because the defendant impliedly stated to her that the place was safe for that purpose and it was the duty of the defendant to have the premises in a reasonably safe condition. The platform fell, the plaintiff was injured and the defendant having failed to show a condition of facts establishing a reasonable degree of care to make the premises what he had held them out to be, he was properly chargeable with liability for the injuries sustained."

Schnizer vs. Phillips, 95 N. Y. Sup. 478.

Where a fire extinguisher was kept on the sill of an open window at the side of the stairway leading to the gallery of a theatre, unsecured, and it was knocked down by the passing patrons of the theatre, injuring one of them, the court said:

> "The accident itself might be regarded, in the absence of explanation, as proof of the negligence charged."

Stair vs. Kane, 156 Fed. Rep. 100, 101.

The burden is on defendant to show due care where a grandstand collapses and the invitee who has paid admission is injured.

Fox vs. Buffalo Park, 47 N. Y. Sup. 788.

The doctrine of *res ipsa loquitur* was applied in the following (and many other) cases:

Case of a cable furnished to the plaintiff for a particular purpose, breaking while being used in a proper manner for that purpose.

La Bee vs. Sultan Logging Co., 20 L. R. A. (N. S.) 405 (Wash.).

Case of a fall of a scaffold furnished by the master for a servant to work on while being properly used by the servant.

Cleary vs. General Contracting Co., 53 Wash. 254.

Fall of a window guard from a window.

Mentz vs. Schieren, 74 N. Y. Sup. 889.

Fall of an elevator put to accustomed use.

Kennedy vs. McAllister, 52 N. Y. S. 714;

National Biscuit Co. vs. Wilson, 78 N. E. Rep. 251 (Ind.);

Stewart vs. Van Deventer Carpet Co., 50 S. E. Rep. 562 (N. C.);

Edwards vs. Manufacturers Building Co., 61 At. Rep. 646 (R. I.).

Fall of a wall under construction.

Scharff vs. Southern Ill. Construction Co., 92 S. W. Rep. 126 (Mo.).

Fall of a tool from a building under construction.

Melvin vs. Penn. Steel Co., 62 N. E. Rep. 379 (Mass.);

Ambright vs. Zion, et al, 79 N. W. Rep. 72 (Ia).

Steam railway used on street ran over fence and garden and against house.

Harlow vs. Standard Improvement Co., 78 Pac. Rep. 1045 (Cal.).

Fall of rock bins on scow underneath.

Hastorf vs. Hudson River Stone Supply Co., 110 Fed. Rep. 669.

Sudden starting of machine after power switched off by operator, injuring operator.

Ross vs. Double Shoals Cotton Mills, 52 S. E. 121.

Horse stepping on electric railway track killed by electric current.

Clarke vs. Nassau Electric Ry. Co., 41 N. Y. Sup. 78;

Wood vs. Wilmington City Ry. Co., 64 At. 246.

Car with power on, running on car track with no one in charge.

Chicago City Ry. Co. vs. Eick, 111 Ill. App. 452.

Fall of a keg on stevedore from hatchway.

Jensen vs. Thomas, 81 Fed. Rep. 578.

Fire destroying lumber, caused by train collision, the collision being held prima facie proof of negligence.

Cinn. Ry. Co. vs. South Fork Coal Co., 139 Fed. Rep. 528, (Circuit Court of Appeals, 6th Circuit).

Ice falling on child from ice wagon.

Cook vs. Piper, 79 Ill. App. p. 291.

Fall of a door.

Klitzke vs. Webb, 97 N. W. 901.

Fall of an open window.

Carrol vs. Chicago B. & N. Ry. Co., 75 N. W. 176.

Collapse of a building.

Patterson vs. Jos. Schlitz Brewing Co., 91 N. W. 336.

Lubelsky vs. Silverman, 96 N. Y. Sup. 1056.

V.

RES IPSA LOQUITUR NOT EXCLUDED BY ALLEGATIONS OF COMPLAINT

It is contended in the brief of Plaintiff in Error that the rule of *res ipsa loquitur* does not apply in this case upon the ground that Defendants Error in their complaint specifically allege the negligence of the defendant relied upon. The principal case cited by Plaintiffs in Error to support their contention is the case of The Great Northern, 251 Fed. Rep. 827, decided by this court. We have already reviewed this case elsewhere in this brief and as a matter of fact, without regard to the rule contended for and suggested by the court, the case was one in which it would have been impossible in any event to have applied the doctrine, irrespective of the question of pleading.

The courts of the country are not in unison upon this point. Three different rules have been laid down, the courts of some states holding with each view.

By some courts the broad rule is laid down that the rule of *res ipsa loquitur* applies even though negligence is alleged specifically and in detail. In others the rule is in such cases held to obtain in so far as it applies in support of the specific negligence alleged, but not to obtain in such a way as to sustain the plaintiff's cause of action upon a different act of negligence than that alleged.

Where the rule contended for is supported it is really based upon the principle of pleading which does not permit a plaintiff to allege that a defendant committed certain acts of negligence and then when the trial is had and defendant is prepared to meet that issue seek to charge him upon a different act of negligence and support that charge with the presumptions involved in the doctrine of *res ipsa loquitur*. See for a full discussion of these three lines of authority, the notes found at 24 L. R. A. (N. S.) 788, and L. R. A. 1915 F. 992.

By an examination of the cases in which the rule contended for by Plaintiff in Error has been followed, it will be found that they are all cases in which the complaint fully and specifically sets forth certain definite acts of negligence and in which the doctrine of *res ipsa loquitur* was not applicable in the nature of

the case. The presumption of negligence which obtains under the doctrine of *res ipsa loquitur* is that because it is not usual for an instrumentality furnished and put to its usual use to break, and because naturally therefore when it does break it is under the doctrine of probabilities more likely that there was some negligence on the part of the party whose duty it was to keep the instrumentality in order, and who had charge of its operation and directed its use, than that it happened without the intervention of such negligence. But the presumption arising under the doctrine of *res ipsa loquitur* is not that some specific act of negligence caused the break and injury, and if the plaintiff in preparing his complaint singles out some particular act or series of acts and charges that the break occurred by reason of acts of negligence of the defendant as to one or more of those particulars and there are other acts of negligence which might as well have caused the injury as the acts alleged, the presumption fails, it being just as likely that some act of negligence other than that specifically alleged caused the injury. The presumption covering all the acts of negligence which might have caused the accident and the plaintff by the allegations of his complaint

having excluded a portion of the acts which would otherwise have been covered by the presumption, there is in such cases some basis for the doctrine contended for by Plaintiff in Error.

But the doctrine is wholly inapplicable to the situation in the case at bar. Plaintiff did not in fact allege any specific act of negligence. The law put upon the Plaintiff in Error the duty of furnishing the Defendant in Error with a safe seat. The complaint goes no further than to charge the defendant with a negligent failure to perform that duty. The allegation of the complaint upon the subject of negligence is,

> "The said accident was caused solely by the negligence of the defendants in placing in the said row or bank of seats the said defective and weak seat and in directing the said plaintiff, Etta Eichelbarger as aforesaid, to seek a seat in the said row or bank and for that purpose to step upon the said seats." (Transcript of Record, p. 3.)

These two acts alleged, that of placing the weak seat where it was to be used by patrons and directing the Defendant in Error to step upon it, were ultimate facts necessary to be alleged in any statement which could be made of the cause of action stated in the complaint, and the negligence is al-

leged by describing them as having been negligently done. To hold that by stating these ultimate facts as to the accident, and which Defendant in Error was compelled to state in any statement of her cause of action, she has therefore precluded herself from the right to rely upon the natural and usual presumptions of fact following from the description of the accident and the circumstances surrounding it, would be to prevent her in any manner availing herself of the presumption of *res ipsa loquitur*, no matter how her pleading might be drawn. It is not alleged how the seats were made weak or defective, in what respect they were so weak or defective, whether it arose from negligence in original construction; in erection when placed together for the purpose of giving the circus at this particular town or from ordinary wear and tear, or from some accident or design or act of a third party, coupled with the failure of the defendant to properly inspect. Any or all of these elements of negligence might have existed. Defendant in Error does not know. The proof was all in the hands of the defendant. But the Plaintiffs in Error did upon Defendant in Error's paying admission and entering the show, direct her to the weak seat and it broke under her

weight, and she having alleged and proven that fact, the presumption of *res ipsa loquitur* follows as a matter of law.

A comparison of the allegations of the complaint in this case with that of every case cited by Plaintiffs in Error to support the contention that the doctrine does not apply in this case, would show radical difference in the pleading in this case and that in the cases cited.

However, we respectfully submit that even had the negligent act of Plaintiffs in Error been specifically alleged in the complaint, the rule contended for should not obtain in this case. It is settled by the decisions of the Supreme Court of the State of Washington, that so far as the State of Washington is concerned, the doctrine of *res ipsa loquitur* is applicable even though the acts of negligence are alleged specifically and in detail.

> *Walters vs. Seattle R. & S. R. Co.*, 24 L. R. A. (N. S.) 789 (Wash.);
>
> *Wodnik vs. Luna Park*, 42 L. R. A. (N. S.) 1070 (Wash.);
>
> *La Bee vs. Sultan Logging Co.*, 20 L. R. A. (N. S.) 405.

If the doctrine contended for by Plaintiffs in

Error as to the applicability of *res ipsa loquitur* in this case applies, it would be by virtue, as it seems to us, of a rule as to pleading, the foundation of the rule being that because of certain pleading certain rules of evidence would not obtain in the case. However, as we understand the law, the rules of practice and pleading which are settled in this state for a personal injury case, following our Code provisions as to pleading, are controlling upon a Federal Court in such a case.

U. S. Revised Statutes, Sec. 721-914.

Parker vs. Moore, 111 Fed. Rep. 470.

This case was reversed by the Circuit Court of Appeals of the Fourth Circuit, but not upon the point to which the case is cited.

Parker vs. Moore, 115 Fed. Rep. 799;
Ex Parte Fisk, 113 U. S. 713;
Glenn vs. Sumner, 132 U. S. 152, 156;
Stewart vs. Morris, 89 Fed. Rep. 290, Circuit Court of Appeals, Seventh Circuit.

U. S. vs. Atlantic Coast Line R. Co., 153 Fed. Rep. 918;

U. S. vs. Parker, 120 U. S. 89.

It is provided by statute in the State of Washington that the complaint shall contain,

"A plain and concise statement of facts constituting the cause of action without unnecessary repetition." Rem. 1915 Code, Sec. 258.

And it is further provided that,

"Its allegations shall be liberally construed with a view to substantial justice between the parties." Rem. 1915 Code, Sec. 285. It is further provided that,

"The court shall in every stage of an action disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party and no judgment shall be reversed or affected by reason of such error or defect." Rem. 1915 Code, Sec. 307.

It is further provided that,

"No variance between allegation in pleadings and proof shall be deemed material unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." Rem. 1915 Code, Sec. 299.

We submit that the decision of our Supreme Court as to the effect of specifically pleading negligent acts upon the evidence required to be introduced is a construction of the pleading under the Statutory provisions of the State regarding pleading and that the rule is, under the Federal Statute, that

the Federal Courts should adopt the local rule as to the construction and application of such statutes.

But there really is no necessity of discussing the question of which rule as to *res ipsa loquitur* should be applied. The complaint in fact does not allege any specific negligence and *res ipsa loquitur* applies under the rules of all the courts. In passing, it is interesting to note that in the brief of Plaintiffs in Error it is contended on pages 15 and 16, first that there is no allegation of negligence sufficient to state a cause of action, and second, that the allegations are so full and specific as to leave no room for presumptions. We have seen a circus rider ride two horses, but never two horses traveling in opposite directions.

VI.

NOTHING IN CASE TO SHOW LATENT DEFECT

In the brief of Plaintiffs in Error it is contended that the evidence of Fred Eichelbarger, a witness for Defendant in Error, showed that he saw nothing to indicate any defect in the board and that this testimony showed that the break was caused by a latent defect. That, however, is the usual situation with persons who are injured by the breaking of appliances which they use in such a place of entertainment. They would not step on a board which to their casual observation as they walked along seeking for a seat, indicated that it was unsafe. Eichelbarger said he did not examine it. Such a casual observation is not such an inspection as is required for the protection of the public on the part of the owner of a Circus. It is extremely probable that even an inspection by the witness Fred Eichelbarger in order to determine safety would not be a sufficient inspection. There was nothing in his testimony to indicate competency to pass upon such a question even had he given the seat the inspection which the duty of the proprietor

required. The jury, as a matter of fact, have found by their verdict that there was negligence and the question of the credibility of the witness was solely for them to determine. Had Plaintiffs in Error used due care, either by proper inspection or in any other way, or had the defect been latent or undiscoverable, it was within the power of the Plaintiffs in Error to prove those facts and the burden under the authorities which we have cited was clearly upon the Plaintiffs in Error. Not having produced any such evidence, it is to be assumed that it could not be produced.

We most respectfully submit that the judgment of the trial court should be affirmed.

CHAS. H. HARTGE, and
& TURNER,

PRESTON, THORGRIMSON &
Attorneys for Defendants in Error.